

## Attachment 13

### Davis-Bacon Act (DBA) Question and Answer Form for Programs Funded by the American Recovery and Reinvestment Act of 2009 (ARRA)

#### **Basic Provisions**

- **What does the Davis-Bacon Act (DBA) require?**

The Davis-Bacon Act requires payment of locally prevailing wages (including fringe benefits) to laborers and mechanics on federal government contracts in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings or public works who are employed directly on the site of the work.<sup>1</sup> Moreover, contractors and subcontractors on covered projects must pay all laborers and mechanics weekly and submit weekly certified payroll records to the contracting or administering agency.<sup>2</sup> In addition, contractors and subcontractors are required to post the applicable Davis-Bacon wage determinations with the Davis-Bacon poster on the job site in a prominent and accessible place where they can be easily seen by workers and maintain payroll and basic records for all laborers and mechanics working at the site for a period of three years.<sup>3</sup>

Congress has added Davis-Bacon prevailing wage provisions to approximately 60 laws—known as Davis-Bacon related Acts (DBRA)—under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance.<sup>4</sup>

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<sup>1</sup> 40 U.S.C. §§ 3142(a) and (c).

<sup>2</sup> All Agency Memorandum No. 207 - Applicability of Davis-Bacon to Federal and federally-assisted construction work funded by the American Recovery and Reinvestment Act of 2009, May 29, 2009, at page 6 (*citing* 40 U.S.C. 3145; 29 CFR Part 3, 29 CFR 5.5) *available at* <http://www.dol.gov/esa/whd/recovery/AAM207.pdf> (referred to below as “AAM Memo No. 207”).

<sup>3</sup> 29 C.F.R. §§ 5.5(a)(1) and (3); *see also* Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA), U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, April 2009, page 1, *available at* <http://www.dol.gov/esa/whd/regs/compliance/whdfs66.pdf> (referred to below as “Fact Sheet #66”).

<sup>4</sup> The Davis-Bacon and Related Acts (DBRA), United States Department of Labor, *available at* <http://www.dol.gov/compliance/laws/comp-dbra.htm>.

- **Are activities funded under the American Recovery and Reinvestment Act of 2009 (ARRA) subject to the Davis-Bacon prevailing wage requirement?**

Section 1606 of ARRA states that the Davis-Bacon prevailing wage requirement broadly applies to construction projects funded with ARRA appropriations.<sup>5</sup> More specifically, Section 1606 provides that all “laborers and mechanics employed ... on projects funded directly by or assisted in whole or in part” with ARRA funds are subject to the requirements of the DBA. Thus, the answer will depend upon whether work is being performed by “laborers and mechanics” at the work site.

- **What constitutes a Davis-Bacon prevailing wage?**

Under the DBA, a “prevailing wage” is made up of two interchangeable components – a basic hourly rate<sup>6</sup> and fringe benefits that have been found prevailing in an area by the Secretary of Labor and published in a Davis-Bacon wage determination.<sup>7</sup> However, the cost of fringe benefits that the contractor or subcontractor is required to pay by other federal, state, or local laws is not included in the prevailing wage.<sup>8</sup>

- **What types of work does the DBA cover?**

The DBA applies to all types of work done on a “public building” or “public work” by laborers and mechanics employed by a construction contractor or construction subcontractor. Under the DBA, work done on a public building or public work is defined to include “construction, prosecution, completion, or repair” which is funded by a “Federal agency to serve the interest of the general public” regardless of whether the title to such property is held by a Federal agency.<sup>9</sup>

Further, the DBA requires that such work be done at the “site of the work,” which is defined as “the physical place or places where the building or work called for in

<sup>5</sup> Sec. 1606, Division A, Pub. L. No. 111-5, 123 Stat. 303.

<sup>6</sup> For information on how DOL’s Wage and Hour Division (WHD) determines prevailing wage rates consult the Prevailing Wage Resource Book, U.S. Department of Labor, July 2009, Section 13, Davis-Bacon Wage Determinations, available at <http://www.dol.gov/esa/whd/recovery/pwrb/toc.htm> (referred to below as “PW Resource Book”) and the Employment Coordinator, Volume 4, §§ 40:60-40:68 (West 2004). See also California Residential Weatherization Wage Determination, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Weatherization Assistance Program, available at [http://apps1.eere.energy.gov/weatherization/pdfs/sf-308\\_ca.pdf](http://apps1.eere.energy.gov/weatherization/pdfs/sf-308_ca.pdf) (recent example of wage determination issued by the WHD in compliance with Davis-Bacon prevailing wage requirements under ARRA for the weatherization of residential structures located in California).

<sup>7</sup> 29 C.F.R. §§ 5.2(p), 5.30(a). For information on when fringe benefits are creditable towards an employer’s prevailing wage obligations refer to PW Resource Book, *supra* note 6, at Section 16, DBA/DBRA Compliance Principles, Fringe Benefits.

<sup>8</sup> 40 U.S.C. § 3141(2)(B).

<sup>9</sup> 29 C.F.R. § 5.2(k).

the contract will remain, and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.”<sup>10</sup>

Work covered under the DBA includes, without limitation:

- Altering, remodeling, and installation (where appropriate) on the site of the work of items fabricated off-site.
- Painting and decorating.
- The manufacturing or furnishing of materials, articles, supplies or equipment on the site of the public building or public work.
- Transportation between the site of the work and a facility which is dedicated to the construction of a public building or public work and deemed a part of the site of the work.<sup>11</sup>

- **What does the \$2,000 threshold for Davis-Bacon coverage pertain to?**

The \$2,000 threshold for Davis-Bacon coverage pertains to the amount of the prime construction contract, not to the amount of the individual subcontracts. If the prime construction contract exceeds \$2,000, all construction work on the project is covered and a standard Davis-Bacon contract clause requires that the Davis-Bacon labor standards be applied to all subcontractors.<sup>12</sup> Further, the \$2,000 threshold applies to the total cost of a contract; it is not based on contract labor costs alone.<sup>13</sup>

### ***Specific Job Categories***

- **Are executive, administrative or professional employees subject to DBA prevailing wage requirements?**

Bona fide executive, administrative, and professional employees, as these terms are defined in 29 C.F.R. Part 541, are not covered by the DBA.<sup>14</sup> Thus, for example, individuals involved in program start-up such as legal counsel and

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<sup>10</sup> 29 C.F.R. § 5.2(1)(1). For a detailed description of the Site of the Work requirement refer to the PW Resource Book, *supra* note 6, at Section 16, DBA/DBRA Compliance Principles, Site of the Work.

<sup>11</sup> 29 C.F.R. § 5.2(j).

<sup>12</sup> AAM No. 207, *supra* note, 2, at page 4, note 12.

<sup>13</sup> Davis-Bacon Compliance: Questions and Answers for the DOE Weatherization Assistance Program (WAP), question 7, available at [http://apps1.eere.energy.gov/weatherization/davis\\_bacon\\_faqs.cfm?print](http://apps1.eere.energy.gov/weatherization/davis_bacon_faqs.cfm?print) (referred to below as “WAP Q&A”).

<sup>14</sup> PW Resource Book, *supra* note 6, Section 16, DBA/DBRA Compliance Principles, Coverage of Laborers and Mechanics.

financial advisors, or employees doing market surveys and marketing, or those tracking and reporting energy savings would not be covered by the DBA.<sup>15</sup>

Similarly, supervisory employees are not regulated under the DBA because their duties are primarily administrative or executive in nature. However, where such employees devote more than 20 percent of their time during a workweek to laborer or mechanic duties, and do not meet the exemption criteria of 29 C.F.R. Part 541, such employees must be paid at least the appropriate wage rate specified in the applicable wage determination.<sup>16</sup>

- **Are home energy raters, energy auditors and inspectors covered by the DBA?**

Activities such as home energy ratings, energy audits, building commissioning inspections and other inspection work are not usually viewed as construction work performed by laborers and mechanics within the meaning of the DBA.<sup>17</sup> Thus, for example, persons conducting home energy ratings, energy audits, and building commissioning inspections, which do not include construction completed by laborers or mechanics, would not be subject to the Davis-Bacon prevailing wage requirement.<sup>18</sup>

- **Are truck drivers covered by the DBA?**

Drivers of a contractor or subcontractor are covered by Davis-Bacon for time spent while working on the site of the work and loading or unloading materials and supplies on the site of the work provided such time is not de *minimis*.<sup>19</sup>

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<sup>15</sup> Email from Department of Energy to California Energy Commission (CEC), August 27, 2009 (referred to below as "DOE to CEC email, August 27, 2009").

<sup>16</sup> Davis-Bacon Wage Determination Reference Material, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Section C, Questions and Answers on the use of Davis-Bacon Wage Determinations, available at <http://www.gpo.gov/davisbacon/referencemat.html>.

<sup>17</sup> Advisory Letter to Mathews Rogers, Sr. Advisor, Office of Secretary, U.S. Department of Energy from Timothy J. Helm, Chief, Branch of Government Contracts Enforcement, Office of Enforcement Policy, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, June 1, 2009, page 2, available at <http://www.dol.gov/esa/whd/recovery/AdvisoryLetterDOE.pdf> (referred to below as "Rogers letter") (stating DOL's position that "certain activities such as energy audits and inspection work are not usually viewed as construction work performed by laborers and mechanics within the meaning of the DBA and, thus, technicians conducting energy audits would not be subject to the Davis-Bacon requirements."). DOE to CEC email, August 27, 2009, *supra* note 15 (stating DOE's position that individuals performing home energy ratings, energy audits and investigations of buildings for projects are not laborers and mechanics, and thus, would not be covered by the DBA).

<sup>18</sup> Rogers letter, *supra* note 17, at page 2. DOE to CEC email, August 27, 2009, *supra* note 15.

<sup>19</sup> All information in this section is taken from the PW Resource Book, *supra* note 6, at Section 16, DBA/DBRA Compliance Principles, Truck Drivers. See also 29 C.F.R. 5.2 ((j)(iv)(A) and (B)).

Further, truck drivers are covered by the DBA while transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site. Truck drivers are also covered while transporting a portion of the building or work between a site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project, and the physical place or places where the building or work will remain.

By contrast, drivers of a contractor or subcontractor are not covered while traveling between a Davis-Bacon job and a commercial supply facility while they are off the site of the work. Similarly, material delivery truck drivers are not covered while off the site of the work. Finally, as noted above, truck drivers are not covered whose time on the site of the work is *de minimis*.

- **Are apprentices and trainees covered by the DBA?**

An apprentice or trainee is a laborer or mechanic who is permitted to work on a project covered by the DBA at less than the rate prescribed in the applicable wage determination for the work he performs. However, these classifications are only permitted to work on DBA covered projects in limited circumstances. More specifically, in order to be paid less than the specified journeyman rate the individual must be registered in an apprenticeship or training program that has either been approved by DOL or a State Apprenticeship Agency which is recognized by DOL prior to the commencement of his employment.<sup>20</sup> Otherwise, the individual is to be paid the DBA prevailing wage for the classification of work that he is performing regardless of his skill level.<sup>21</sup>

- **Are helpers covered by the DBA?**

A distinct classification of “helper” will be issued in wage determinations applicable to work performed on DBA-covered construction projects only where the following conditions are satisfied:

- The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
- The use of such helpers is an established prevailing practice in the area;
- The helper is not employed as a trainee in an informal training program; and,

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<sup>20</sup> Additional requirements that must be satisfied in order for persons employed in these classifications to be paid at less than the DBA prevailing wage are found in 29 C.F.R. §5.5(a)(4). See also PW Resource Book, *supra* note 6, Section 16, DBA/DBRA Compliance Principles, Apprentices and Trainees and Employment Coordinator, Volume 3, § 19:9 (West 2006).

<sup>21</sup> WAP Q&A, *supra* note 13, at question 50.

- The work to be performed by the helper is not performed by a classification in the wage determination.<sup>22</sup>

- **Are volunteers covered by the DBA?**

“As a general matter, DOL’s longstanding interpretation of the Davis-Bacon and related Acts is that there are no exceptions from labor standards coverage for volunteer labor unless an exception is specifically provided for in the particular related Act under which the project funds are derived.”<sup>23</sup> “Under DOL’s regulations, every person performing the duties of a laborer or mechanic in the construction, prosecution, completion or repair of a public building or public work, or of a building or work financed in whole or in part by Federal loans, grants or guaranties, is considered employed by the project’s contractor regardless of any contractual relationship to the contrary between the contractor and that person.”<sup>24</sup>

However, the Davis-Bacon Act “does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wages.”<sup>25</sup> Thus, where the compensation, e.g., rates of pay, living allowances, or other benefits, provided to participants in volunteer programs is specified by federal statute, DOL believes that such individuals are not covered by Davis-Bacon prevailing wage requirements.<sup>26</sup> For example, the authorizing statutes for the Youth Conservation Corps, 16 U.S.C. Section 1703(a)(3), and the Public Land Corps, 16 U.S.C. Section 1726, specifically require the Secretaries of Interior and Agriculture to set the rates of pay or living allowances for the Corps’ participants. Similarly, statutory language implementing the American Conservation and Youth Service Corps (AmeriCorps), 42 U.S.C. Section 12655/, and Volunteers in Service to America (VISTA), 42 U.S.C. Section 4955, specify the living allowances and other benefits that must be provided to each participant. DOL believes that participants in these federal youth programs would not be covered by Davis-Bacon labor standards.<sup>27</sup>

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<sup>22</sup> 29 C.F.R. § 5.2(n)(4). For additional information on the helper classification refer to Employment Coordinator, Volume 4, § 19:11 (West 2004).

<sup>23</sup> Advisory Letter to Chris Henderson, Sr. Advisor, Office of Secretary, US Department of the Interior, from Timothy J. Helm, Chief, Branch of Government Contracts Enforcement, Office of Enforcement Policy, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, May 29, 2009, page 3, available at <http://www.dol.gov/esa/whd/recovery/AdvisoryLetterHenderson.pdf>

<sup>24</sup> *Id.* (citing 29 CFR 5.2(0)).

<sup>25</sup> *Id.* at 4 (citing Section 4 of the Davis-Bacon Act, 40 U.S.C. § 3146).

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.*

## ***Municipal Financing District Programs***

- **Has the Department of Energy (DOE) provided guidance on when DBA prevailing wage requirements would apply to ARRA-funded projects under a municipal financing district program?**

California law allows the legislative bodies of cities, counties, or groups of cities and counties in California to create a financing district in which property owners may enter into contractual assessments to finance the installation of energy efficiency or distributed renewable energy generation improvements that are permanently fixed to real property.

Under a municipal financing district program, property owners privately contract for the installation of energy efficiency retrofits and/or renewable energy systems and pay contractors for their services. Property owners also contract with their local government to receive municipal financing for these improvements. Property owners repay these loans with their property taxes, and the liens associated with these loans have priority over previously-recorded private liens (such as a mortgage).

Provided that local governments only use ARRA funds to pay administrative costs to implement a municipal financing district program, DOE's position is that Davis-Bacon prevailing wage requirements would not apply to a local government or flow down to property owners who have received financing from a local government for the installation of energy efficiency retrofits and/or renewable energy systems.<sup>28</sup> Further, provided ARRA funding is only used to pay such administrative costs, DBA prevailing wage requirements would not apply despite a local government undertaking any or all of the following activities:

- Establishing an approved list of contractors for the municipal financing district program and requiring that property owners use an approved contractor from the list.

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<sup>28</sup> DOE's guidance, as expressed in this section, was provided in an email correspondence from DOE to the Energy Commission, October 6, 2009.

- Supervising the installation of property owners' energy efficiency retrofits or renewable energy systems.
- Requiring that property owners obtain the local government's approval of final installation of energy efficiency retrofits or renewable energy systems as a condition of receiving financing.

However, if the local government either uses all or a portion of ARRA funds as part of the municipal financing (i.e., the pool of money used to fund the loans to property owners), or the local government commingles ARRA funds with other funding sources used as part of the municipal financing and does not keep these funding sources separate, then Davis-Bacon Act prevailing wage requirements would apply to the local government and flow down to the homeowner.

### ***Miscellaneous Issues***

- **What constitutes a project for purposes of DBA coverage?**

DOL's "long-standing position" is that a project consists of all the construction which is necessary to complete the building or work regardless of the number of contracts involved so long as all contracts awarded are closely related in purpose, time and place.<sup>29</sup> Moreover, as noted, Section 1606 of ARRA provides that Davis-Bacon labor standards apply to "projects funded directly by or assisted in whole or in part" with ARRA funds, and thus, there is DBA coverage for projects that only receive partial funding. Therefore, "Section 1606's language precludes intentional splitting of ARRA projects into separate and smaller contracts to avoid Davis-Bacon coverage on some portion of a larger project, particularly where the activities are integrally and proximately related to the whole."<sup>30</sup>

Nonetheless, as "[t]here are many situations in which major construction activities are clearly undertaken in segregable phases that are distinct in purpose, time, or place," DOL recognizes that every situation must be examined independently.<sup>31</sup>

- **Does the DBA prevailing wage requirement apply to work performed by a governmental agency's own employees?**

Governmental agencies (such as States or their political subdivisions) are not considered "contractors" or "subcontractors" within the meaning of the DBA when

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<sup>29</sup> Henderson letter, *supra* note 23, at page 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



the construction is performed by their own employees on a force account basis.<sup>32</sup> Similarly, tribal governments are not considered by DOL to be contractors or subcontractors, and their workers are not covered by the DBA.<sup>33</sup>

- **Does the Davis-Bacon Act preempt state and local prevailing wage requirements?**

Contractors on projects subject to DBA labor standards may also be subject to additional prevailing wage and overtime pay requirements under state and local laws.<sup>34</sup> In California, courts have held that because legislation providing for the payment of prevailing wages comes under the historic police powers of the state, absent a contrary intention expressed in a federal statute, the presumption is that such legislation is not superseded.<sup>35</sup> Therefore, absent such an express statement preempting state prevailing wage requirements, whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort, California prevailing wage rates, when higher, must be applied.<sup>36</sup>

#### ***Additional Information on DBA***

- DOL Recovery Act website at <http://www.dol.gov/esa/whd/recovery/>.
- Department of Energy Weatherization Assistance Program website at [http://apps1.eere.energy.gov/weatherization/recovery\\_act.cfm](http://apps1.eere.energy.gov/weatherization/recovery_act.cfm).
- Davis-Bacon Labor Clauses, available from DOL's website at [http://apps1.eere.energy.gov/weatherization/pdfs/dba\\_clauses\\_weatherization.pdf](http://apps1.eere.energy.gov/weatherization/pdfs/dba_clauses_weatherization.pdf).

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<sup>32</sup> Rogers letter, *supra* note 17, at page 2. See 29 C.F.R. 5.2(h) ("A State or local Government is not regarded as a contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees.") See DOL Field Operations Handbook, Section 15b05, available at [http://www.dol.gov/esa/whd/FOH/FOH\\_Ch15.pdf](http://www.dol.gov/esa/whd/FOH/FOH_Ch15.pdf) (explaining that where a government agency or a State or political subdivision using federal grant money decides not to contract out the work but actually performs it with its own employees, such work is generally known as "force account," and is not generally subject to the DBA prevailing wage requirement).

<sup>33</sup> WAP Q&A, *supra* note 13, at question 13.

<sup>34</sup> Fact Sheet #66, *supra* note 3, at page 2. See Employment Coordinator, Volume 3, § 19:5 (West 2006) ("While the Davis-Bacon Act requires a contractor to pay not less than the prevailing wage rate established by the DOL, it does not guarantee that the contractor will not have to pay more.")

<sup>35</sup> *Reyes v. Van Elk, Ltd.* (Cal.App. 2 Dist. 2007) 148 Cal.App.4th 604, 616.

<sup>36</sup> 8 C.C.R. § 16001(b).

- Weatherization Assistance Program Notice 09-9, Subject: Guidance on Implementation of the Davis-Bacon Act Prevailing Wage Requirements in the American Recovery and Reinvestment Act of 2009, Department of Energy, July 21, 2009, available from DOE's Weatherization Assistance Program website at <http://www.waptac.org/si.asp?id=1392>.
- The Wage and Hour Division of the Department of Labor maintains seven regional district offices in California. Contact information for these district offices may be found at <http://www.dol.gov/esa/whd/america2.htm#California>.
- Frequently Asked Davis-Bacon Questions and Answers, Department of Energy, Energy Efficiency and Renewable Energy, State Energy Program, *available at* [http://apps1.eere.energy.gov/state\\_energy\\_program/davis\\_bacon\\_faq.cfm](http://apps1.eere.energy.gov/state_energy_program/davis_bacon_faq.cfm).